

IN THE COURT OF APPEAL

R. M. CIVIL APPEAL NO. 31/72

B E F O R E : The Hon. Mr. Justice Luckhoo - Presiding

The Hon. Mr. Justice Fox

The Hon. Mr. Justice Edun

BETWEEN SHIRLEY CAMPBELL - DEFENDANT/APPELLANT

A N D PEARLINE JACKSON - PLAINTIFF/
RESPONDENT

Mr. H. G. Edwards, Q. C. for Defendant/Appellant

Mr. C. Hines for Plaintiff/Respondent

20TH OCTOBER, 1972

FOX, J. A.,

This is an appeal from a judgment of the learned Resident Magistrate for the parish of St. Catherine, in which he awarded damages to the plaintiff in an action for trespass. The plaintiff lived with one Cassley Campbell as man and wife for a period of twenty years, up to the time of the death of Campbell on the 28th of August, 1971. During the last five years of this period they lived at 13A Old Harbour Road. These premises were owned by Campbell. The plaintiff sought to establish that they had been given to her by the deceased prior to his death. For this purpose, a document was produced when the plaintiff was giving her evidence, but upon objection by Mr. Edwards who appeared for the defendant at the trial, the document was not tendered in evidence. Proof of the gift of the premises to the plaintiff was therefore left to her bare ipse dixit and to inferences which will be noticed later.

The defendant is the lawful son of the deceased, Campbell and the sole executor of his will. This will was made on 12th of November, 1970. It was duly probated in the Supreme Court.

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A certified copy of the probate and copy will were received in evidence at the trial. The trespass complained of was the entry by the defendant upon premises at 13A Old Harbour Road, Spanish Town, on the 20th of September, 1971, and the effective taking of actual possession of these premises by the defendant on that date.

The learned Resident Magistrate stated in his Reasons for Judgment that he accepted the plaintiff's evidence that the premises had been given to her by her common-law husband prior to his death. He also found this fact as an inference from two admitted facts:

- (a) The will of Campbell made no mention of 13A Old Harbour Road, whereas other properties had been specifically devised.

It seemed to the Magistrate that the probable explanation for this omission was that the deceased had already divested himself of these premises.

- (b) The defendant admitted that he never collected rent from the tenants on the premises, whereas the plaintiff said that she had done so.

The Magistrate thought that if the defendant had any authority as executor to enter and take possession he would have given the tenants notice from the death of the testator that all rent should be paid him. The Magistrate concluded that the plaintiff was in actual possession, and that the entry of the defendant and his purported taking of possession was unlawful and a trespass.

The substantial complaint on appeal was that the defendant was entitled to enter and take possession of all the lands of which the deceased was possessed in law and in equity at the time of his death. This was so because although the will did not specifically mention 13A Old Harbour Road, it contained a residuary clause in favour of the defendant, which was effective to secure that result. 13A Old Harbour Road was admittedly owned by the deceased. In the absence of evidence...

evidence that the premises had been validly transferred to the plaintiff, it must be presumed, argued Mr. Edwards, that it continued in the possession of the deceased right up to the time of his death. The appellant was therefore entitled to take possession of the property by virtue of the will. There is really no answer to this contention.

The finding of the magistrate of a gift of the land to the plaintiff is not supportable on the evidence which was before him. The gift of an interest in land requires evidence in writing. Such proof may have been available to the plaintiff in the deed of gift which was produced but not tendered. The mere assertion of the plaintiff of a gift to her was insufficient proof of that fact. The two facts relied upon for the inference of gift are also incapable of that result. The will was made on the 12th of November, 1970. The deed of gift was purported to be executed on the 20th of July, 1971. At the time he made his will the deceased had not disposed of his land by gift, and no inference can be drawn from his failure to mention specifically in his will the premises at 13A Old Harbour Road. Neither can any inference be drawn from the circumstances that the appellant did not collect rent, whereas the plaintiff did. Within twenty-three days of the death of his father, the appellant took possession of his property, and the fact that he did not collect rent is of no significance.

It is clear and elementary law that the person who has the right in law to the immediate possession of land, does not commit a trespass when he enters upon that land pursuant to the exercise of that right. Such an entry has the effect of extinguishing the right of any person who may be in actual possession of the land at the time of entry. This is so because of the superiority of the title of the person who is in law entitled to the immediate possession of the land. Indeed, by virtue of the doctrine of trespass by relation back, the person having the right to immediate possession is deemed upon entry

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to be in actual possession from the date when his right accrued. The paramouncy of the position of the person who is entitled to possession was explained by Maul J. in Jones v. Chapman (1847) 2 Exch. at p. 821, thus:-

" As soon as a person is entitled to possession, and enters in the assertion of that possession the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

This passage was quoted by Lord Selbourne with approval in Lows v. Telford (1876) 1 App. Case at p.426. When the defendant entered upon the land in exercise of his right to possession the actual possession was in him and not in the plaintiff. The defendant could not therefore be held liable in trespass to the plaintiff.

For these reasons, the appeal must be allowed. The judgment of the magistrate must be set aside, and judgment entered for the defendant with costs to be agreed or taxed. The appellant should have the cost of this appeal, forty dollars (\$40).

EDUN, J.A.,

I would like to say that the plaintiff/respondent brought this action for trespass against the defendant/appellant who was the executor of the estate of Cassley Campbell, and it is undisputed that the land at 13A Old Harbour Road, Spanish Town, belonged to the said Cassley Campbell. In my view, in the circumstances of this case, for the plaintiff/respondent to succeed in her claim for trespass, she would have to prove strictly her title and right to possession. She would have done this if her

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deed of gift was tendered, admitted and its validity duly considered in evidence before the learned Resident Magistrate. She has failed to prove this and so the judgment of the learned Resident Magistrate in finding the executor of the estate of Cassley Campbell a trespasser is untenable.

LUCKHOO, J.A.,

I have nothing to add to the judgments already delivered. The decision of the Court is as proposed by Fox, J.A.